S.B. CIVIL REVISION PETITION NO.321/2004

Narendra Pratap vs. Gopi Lal and others.

Date : 10.8.2005

HON'BLE MR. PRAKASH TATIA, J.

Mr. SN Trivedi, for the petitioner.

Mr. Sandeep Shah, for the respondents.

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REPORTABLE

Heard learned counsel for the parties.

The petitioner is aggrieved against the order dated 14.7.2004 by which the petitioner's application filed under Order 9 Rule 4 CPC for getting restoration of the suit was dismissed by the trial court.

Brief facts of the case are that the plaintiff's suit was dismissed in default on 6.8.2003. Before that the defendants were also served and they had also submitted written statement. Despite this fact, the plaintiff submitted application under Order 9 Rule 4 CPC which is a provision for getting restoration of the suit in case the suit is dismissed under the provisions of Order 9 Rule 2 or Order 9 Rule 3 CPC i.e. before service of summon on defendant or where both the parties fail to appear when suit is called for hearing. In fact, the suit of the plaintiff was dismissed under Order 9 Rule 8 CPC i.e. after service of the defendant and not in the absence of both the

parties but was dismissed as only the plaintiff did not appear when case was called for hearing and defendant was present in Court. Therefore, the application for restoration of the suit in facts of the case could have been under Order 9 Rule 9(1) CPC. When the plaintiff submitted the application under Order 9 Rule 4 CPC, the defendant raised the objection that the application filed by the plaintiff under Order 9 Rule 4 CPC is not maintainable. It appears from the impugned order that the court below has not applied its mind despite objection of the defendant in writing and did not decide this question while rejecting the petitioner/plaintiff's application. However, the trial court dismissed the petitioner's application which was filed with title under Order 9 Rule 4 CPC but as stated above without deciding whether the application of the plaintiff under Order 9 Rule 4 CPC is maintainable and without considering whether the petitioner's said application can be treated as filed under Order 9 Rule 9 CPC. This became reason for the petitioner to prefer revision petition to challenge the impugned order of the trial court as if the trial court would have treated the application to be under Order 9 Rule 9 CPC, the order would have been appealable.

Learned counsel for the respondents vehemently submitted that the petitioner's application under Order 9 Rule 4 CPC was not maintainable and, therefore, this Court may not interfere in the impugned order as in either case, the petitioner's application is liable to be dismissed.

According to learned counsel for the respondents, even if the application under Order 9 Rule 4 CPC is treated to be under Order 9 Rule 9 CPC, then any order passed under Order 9 Rule 9 CPC is appealable under Order 43 Rule 1(c) CPC and, therefore, this Court has no jurisdiction to hear this matter as appellate court in view of the fact that an appeal to challenge the impugned order lies to the District Court and not to High Court.

It is clear from the facts mentioned above that the plaintiff's suit was dismissed after service of summons upon the defendant and has not been dismissed under Order 9 Rule 2 or 3 CPC. Therefore, the title of the petitioner's application appears to be wrong and this application can be treated to be filed under Order 9 Rule 9 CPC as all the ingredients for getting the order of dismissal set aside are mentioned in the application. The trial court should have treated this application of the plaintiff under Order 9 Rule 9(1) CPC and should have considered the objection raised by the defendants at proper time. Because of this reason only, the petitioner had no alternative except to prefer revision petition, treating the order to be under Order 9 Rule 4 CPC for which there is no provision for appeal provided. In view of the above facts, the application of the petitioner is treated to be filed under Order 9 Rule 9 CPC and not under Order 9 Rule 4 CPC and the order of the trial court is held to be, since on application under Order 9 Rule 9 CPC is passed under Order 9 Rule 9 CPC and consequently, appealable order.

In view of the above, this revision petition is liable to be dismissed as not maintainable.

Learned counsel for the petitioner prays that in the above circumstances, since this Court has held that the revision petition is not maintainable as the application of the plaintiff should have been treated under Order 9 Rule 9 CPC and the order though purported to have been passed under Order 9 Rule 4 CPC is in fact under Order 9 Rule 9 CPC, therefore, he may be permitted to withdraw this revision petition so that he may prefer appeal to challenge the impugned order dated 14.3.2002 and since this Court also could have permitted the conversion of revision into appeal but this Court has no jurisdiction to hear appeal as it lies to District court, therefore, in the totality of the facts, the plaintiff may be permitted to challenge the impugned order by filing appeal before appropriate forum.

Learned counsel for the petitioner apprehends that the petitioner's appeal may be dismissed on count of delay in filing the appeal.

Since this Court held the order to be under Order 9 Rule 9 CPC, therefore, the petitioner has right to challenge the order by filing appeal. The apprehension of learned counsel for the petitioner on the basis of delay is not well founded in view of the fact that the plaintiff who was bonafidely prosecuting the case in the Court can submit the application under Section 14 of the Limitation Act for

taking benefit of this period of prosecuting case in wrong court and at the same time, the application for condonation of delay may be submitted for the remaining period also. The appellate court can consider the application of the plaintiff sympathetically in view of the fact that the suit was for partition of the property.

In view of the above, the revision petition is dismissed as withdrawn with liberty to the petitioner to challenge the impugned order in appeal and the order under challenge is declared to be under Order 9 Rule 9 CPC.

(PRAKASH TATIA), J.

S.Phophaliya